(2)

No. 91-243

IN THE

Supreme Court of the United States

October Term, 1991

KAREN ENRIGHT, an Infant under the age of 14 years old, by her mother and natural guardian, PATRICIA ENRIGHT,
Petitioner,

PATRICIA ENRIGHT, Individually, and
EARL ENRIGHT, Individually,
Plaintiffs

against

ELI LILLY & COMPANY, E.R. SQUIBB & SONS, INC., ABBOTT LABORATORIES, THE UPJOHN COMPANY, MERCK & COMPANY, INC., and RXDC, INC., formerly known as REXALL CORPORATION, formerly known as REXALL DRUG COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS.

BRIEF OF RESPONDENTS E.R. SQUIBB & SONS, INC., ABBOTT LABORATORIES, MERCK & CO., INC., THE UPJOHN COMPANY AND RXDC, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the decision of the New York State Court of Appeals, declining as a matter of State common law to recognize petitioner's[1] claims for "preconception tort," raise any issues of due process or equal protection of the laws which should be reviewed by this Court, especially in view of the fact that petitioner first attempted to raise such issues on her petition for reargument of the Court of Appeals' decision?

[1] As used in this brief, petitioner refers to the infant plaintiff, Karen Enright.

PARTIES

The names of the parties appear in the caption of the case.[2]

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[2] Respondent, E.R. Squibb & Sons, Inc. is a wholly-owned subsidiary of Squibb Corporation, which is a wholly-owned subsidiary of Bristol-Myers Squibb Corporation. The other affiliates and subsidiaries of Squibb Corporation (except for wholly-owned subsidiaries) are Squibb-Marsam, Inc.; Squibb-Novo, Inc.; Chesapeake Biological Laboratories, Inc.; Medaphis Corporation; Squibb of Bangladesh, Ltd.; Squibb Industria Quimica, S.A.; P.T. Squibb Indonesia; Squibb Korea Limited; Squibb Pakistan Ltd; Von Heyden Gessellschaft Mit Beschrankter Haftung; Manufactureros Quimicos Farmaceuticos S.A.; Synbiotics Limited; R.C.S. Realty Corporation, Sino-American Shanghai Squibb Pharmaceuticals, Inc.; and Squibb (Nigeria) Limited.

Respondent Merck & Co., Inc.'s parents, subsidiaries and affiliates include:

Astra/Merck, Inc.; Calgon Canada, Inc.; Charles E. Frosst & Co. (Middle East) S.A.L.; International Indemnity Limited; INTERX Research Corporation; Kelco Specialty Colloids, Limited; Laboratorios Prosalud S.A.; Laboratorios Prosalud, S. de R.L. de C.V.; Lan-O-Leen (Australia) Proprietary Limited; Maquifar S. de R.L. de C.V.; Merck and Company, Incorporated; Merck Farms, Inc.; Merck Foreign Sales Corporation;

Merck Holdings, Inc.

- Calgon Corporation
  - Calgon Interamerican Corporation
  - Chemviron Speciality Chemicals Limited
  - Chemviron Speciality Chemicals N.V./S.A.
  - Kelco International S.A.
  - MSD International Holdings, Inc.
    - Banyu Pharmaceutical Co., Limited
      - A.S.C. Service Co., Ltd.
      - Nippon, Merck-Banyu Co., Limited
  - Proveedores Tecnicos, S.A. de C.V.
- Compagnie Chimique Merck Sharp & Dohme S.A.
  - Perlux S.A.
  - Perlux Labo S.A.
- Frosst Laboratories, Inc.

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Hubbard Farms, Inc.
Hubbard Europa B.V.
Hubbard Belgium International N.V.
Hubbard Deutschland GmbH
Hubbard France S.A.R.L.
Hubbard Ireland Limited
Hubbard Italia SRL
Hubbard Nederland B.V.
Hubbard Poultry U.K. Limited
Hubbard Foods, Inc.
Spafas, Incorporated
Kelco Company
Kelco Holdings Limited
Monterey Kelp Corporation
Kelco Oil Field Group, Inc.
Laboratoires Merck Sharp & Dohme-Chibret S.A.
Chibret International
Chibret Pharmazeutische GmbH
Merck Frosst Canada Inc.
General Trade Co., S.A.
Merck Sharp & Dohme B.V.
Merck Sharp & Dohme GmbH
Merck Sharp & Dohme (Holdings) Limited
British United Turkeys Limited
British Oven Ready Turkey Distributors Limited
Hockenhull Turkeys Limited
John S. Lintern Limited
R.F. Lawrence Limited
Turkey Research & Development Limited
Kelco Biospecialities Limited
Merck Sharp & Dohme Limited
Thomas Morson & Son Limited
Merck Sharp & Dohme (I.A.) Corp.
Merck Sharp & Dohme (Argentina) Inc.
Merck Sharp & Dohme Industrial e Exportadora Limitada
Merck Sharp & Dohme Farmaceutica e Veterinaria Ltda.
Prodome Farmaceutica e Exportadora Ltda.
Prodome Quimica e Farmaceutica Ltda
Merck Sharp & Dohme (International) Limited
Merck Sharp & Dohme (Asia) Limited
Merck Sharp & Dohme Chibrat AG
Merck Sharp & Dohme de Venezuela, C.A.

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Merck Sharp & Dohme (Italia) S.P.A.
Istituto Di Ricarche Di Biologia Molecolara SpA
Merck Sharp & Dohme (Proprietary) Limited
Merck Sharp & Dohme S.A.
Merck Sharp & Dohme (Ireland) Limited
Charles E. Frosst (U.K.) Limited
Kelco International Limited
Alginate Industries (Ireland) Limited
Alginate Industries Limitedain
Alginate Industries (Scotland) Limited
Arramara Teoranta
Kelco International GmbH
Kelco International Pension Trust Limited
Kelp Industries Pty. Limited
Fregenal Holdings, S.A.
Frosst Iberica, S.A.
Laboratorios Quimico-Farmaceuticos
Chibret, Ltda.
Merck Sharp & Dohme de Espana, S.A.
MSD Overseas Finance, N.V.
Fabrica de Products Quim. y Farm. ABELLO, S.A.
MSD Finance, B.V.
Neopharmed S.p.A
Merck Sharp & Dohme (Sweden) A.B.
Kronans Droghandel AB
MSD Lakemedel (Scandinavia) A.B.
MSD (Norge) A/S
Merck Sharp & Dohme Quimica de Puerto Rico, Inc.
MSD Sharp & Dohme GmbH
Dieckmann Arzneimittel GmbH
Frosst Pharma GmbH
Prosalud Peruana S.A.
Suomen MSD Oynd
Kiinteisto Oy Irmelinpesa
Merck Sharp & Dohme A/S; Merck Sharp & Dohme (Australia) Proprietary Limited; CEF Pty. Limited; Merck Sharp & Dohme Belgium S.A.; Merck Sharp & Dohme (Europe) Inc.; Merck Sharp & Dohme (Greece) Inc.; Merck Sharp & Dohme Industria Quimica e Veterinaria Limitada; Merck Sharp & Dohme, Limitada; Merck Sharp & Dohme (New Zealand) Limited; Mannings Limited;

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Charles E. Frosst (New Zealand) Limited; Merck Sharp & Dohme Overseas Finance N.V.; Merck Sharp & Dohme of Pakistan Limited; Merck Sharp & Dohme (Panama) S.A.; Merck Sharp & Dohme (Philippines) Inc.; Merck Sharp & Dohme Scientific and Management Corp., Inc.; Merck Sharp & Dohme (Zimbabwe) (Private) Limited; Merind Limited; MSD AGVET AG; and MSD (Japan) Co., Limited.

Respondent Abbott Laboratories' subsidiaries and affiliates include: Abbott Carribbean, Inc., Abbott Chemicals, Inc.; Abbott Diagnostics, Inc.; Abbott Export Co.; Abbott International Ltd.; Abbott International Ltd. of Puerto Rico; Abbott Laboratories; Abbott Laboratories Fund; Abbott Laboratories International Co.; Abbott Laboratories Accredited Office; Abbott Laboratories (Puerto Rico), Incorporated; Abbott Laboratories Pacific Ltd.; Abbott Laboratories Services Corp.; Abbott Laboratories Utilities Corp.; Abbott Manufacturing, Inc.; Abbott Pharmaceuticals, Inc.; Abbott Research, Inc.; Abbott Trading Company, Inc.; Abbott Universal Ltd.; Boston Scientific Corporation; CMM Transportation, Inc.; Corporate Alliance, Inc.; Fuller Research Corp.; HAVEN Leasing Corp.; HAVTEX Leasing Corp.; Laser Surgery Partnership; M & R Dietetic Laboratories, Inc.; Medlase Holding Corp.; The Murine Company, Inc.; Ningbo Abbott Biotechnology Ltd.; North Shore Properties, Inc.; Oximetrix de Puerto Rico, Inc.; Oximetrix, Inc.; Ross Laboratories, Inc.; Sorenson Research Co., Inc.; Swan-Myers, Incorporated (Illinois); Swan-Myers, Incorporated (Indiana); TAP Manufacturing, Inc.; TAP Pharmaceuticals; The Clara Abbott Foundation; Tobal Products, Inc.; Abbott Laboratories Agentina S.A.; Abbott Laboratorios do Brasil Ltda.; Abbott Laboratories de Chile, Ltda.; Abbott Laboratories de Columbia, S.A.; Abbott Laboratories de Ecuador S.A.; Abbott S.A. de C.V. (El Salvador); Abbott Greneda, Ltd (Grenada); Abbott Laboratories S.A. (Guatemala); Abbott Laboratories de Mexico S.A. de C.V.; Abbott West Indies Ltd. (Jamaica); Consolidated Laboratories Ltd. (Jamaica); Abbott Laboratories S.A. (Peru); Abbott Laboratories C.A. (Panama); Abbott Overseas (Panama); Abbott Laboratories CA (Venezuela); Abbott Laboratories Uruguay Ltda.; Medicamentos M & R, S.A. (Venezuela); Abbott Gesellschaft mbH (Austria); Abbott S.A. (Belgium); Abbott Laboratories Limited (England); Abbott Laboratories Trustee

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Co., Ltd. (England); Abbott Laboratories A/S (Denmark); Abbott GmbH (Germany); Abbott Laboratories (Hellas) S.A. (Greece); Famar Panos A. Marinopoulos S.A. (Greece); Famar Anonymous Industrial Company of Pharmaceuticals and Cosmetics (Greece); Abbott Laboratories Ireland, Ltd.; Abbott Ireland, Ltd (Bermuda); Abbott Ireland, Ltd.; Abbott S.p.A. (Italy); Laboratori Abbott S.p.A. (Italy); Abbott Laboratories Limited (Canada); Abbott B.V. (The Netherlands); Edisco B.V. (The Netherlands); M & R Laboratoria B.V. (The Netherlands); Abbott Laboratories, Limitada (Portugal); Abbott Laboratories S.A. (Spain); Abbott Cientifica S.A. (Spain); Abbott Scandinavia A.B. (Sweden); Investment Services A.G. (Switzerland); Abbott Laboratories S.A. (Switzerland); Overseas Services S.A. (Switzerland); Oximetrix GmbH (Germany); Abbott Finance Company S. ar. 1. (Switzerland); Abbott A.G. (Switzerland); Abbott Laboratories (Bangladesh) Ltd.; Abbott Australian Holdings Pty. Limited; Abbott Australian Pty. Ltd. (Australia); Abbott Laboratories (India) Ltd.; Abbott Korea Ltd. (Korea); P.T. Abbott Indonesia; Abbott Laboratories (N.Z.) Ltd. (New Zealand); Abbott Laboratories Limited (Thailand); Abbott Laboratories (Malaysia) Sdn.Bhd.; Abbott Laboratories (Pakistan) Ltd.; Abbott Laboratories (Singapore) Private Ltd.; 102 E. de los Santos Realty co., Inc. (Philippines); Abbott Laboratories (Philippines); Union-Madison Realty Co., Inc. (Philippines); Abbott middle East Sar. I. (Lebanon); Abbott Laboratories (Mozambique) Limitada; Abbott Laboratories South Africa (Pty.) Ltd.; Abbott Laboratories Nigeria, Ltd.; Abbott Laboratuarlari Ithalat Ihracat Ve Ticaret Anonim Sirketi (Turkey); Abbott Laboratories Limited (Hong Kong); Abbott Japan K.K. (Japan); and Dainabot K.K. (Japan); Abbott Blotech, Inc. (Delaware); Abbott Laboratories Residential Development Fund, Inc. (Illinois); Abbott Structural Research, Inc. (Illinois); Omni-Flow, Inc. (Delaware); Pancretec, Inc. (California); Abbott Hospitals Limited-Nassau, The Bahamas; Abbott France, S.A. (effective 9-1-90) Paris, France; Abind Healthcare Private Limited (Bombay, India); and Abbott Pharmaceuticals, Inc. (Name changed to Abbott Health Products, Inc. as of January 1, 1990).

(Footnote continued on following page.)

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Respondent The Upjohn Company's subsidiaries are:

Kalamazoo Center Holdings, Inc.; Asgrow Argentina S.A.I.C.; Asgrow do Brazil Sementes Ltda.; Asgrow Canada, Ltd.; Asgrow France S.A.; Asgrow G.m.b.H.; Horticulture de Salamo; Asgrow Mexicana, S.A. de C.V.; Bruinsem-Selectiebedrijven B.V.; Asgrow Seed New Zealand Limited; Asgrow South Africa Ltd.; Asgrow Florida Company: Asgrow Seed Company; O's Gold Seed Company; Oxford Laboratories of Iowa, Inc.; Upjohn Coordination Center N.V.; The Upjohn Holding Company C; The Upjohn Holding Company M; UFSC, Inc.; Upjohn S.A.; Kenral Inc.; Upjohn Compania Limitada; Compania Upjohn S.A.; Upjohn Limited; Laboratories Upjohn S.A.R.L.; Upjohn G.m.b.M. Upjohn Vermaltungs G.m.b.H.; Compania Farmaceutica Upjohn S.A.; Upjohn S.p.A.; Upjohn S.A. de C.V.; Upjohn Inc.; Upjohn Farmoquimica Lda.; The Upjohn Manufacturing Company; Upjohn Limited; Upjohn Farmaquimica, S.A.; Upjohn AE; Upjohn Laboratories Ltd.; Upjohn Company Limited; Bio-Vac Labs, Inc.; Upjohn Holding Company; Upjohn Inter-American Corporation; Upjohn International, Inc.; Upjohn Overseas Company; Upjohn Pharmaceuticals Limited; Upjohn Trading Corporation; Laboratories Upjohn C.A.

Respondent Rexall Drug Company, now known as RXDC Liquidating Trust, was dissolved on August 13, 1987. At the time of its dissolution, RXDC Liquidating Trust had no parents, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

October Term, 1991

No. 91-243

KAREN ENRIGHT, an Infant under the age of 14 years old, by her mother and natural guardian, PATRICIA ENRIGHT,

Petitioner,

PATRICIA ENRIGHT, Individually, and EARL ENRIGHT, Individually,

Plaintiffs,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF RESPONDENTS E.R. SQUIBB & SONS, INC., ABBOTT LABORATORIES, MERCK & CO., INC., THE UPJOHN COMPANY AND RXDC, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

JURISDICTION

This Court lacks jurisdiction of this case because, as discussed in the Reasons for Denying the Writ, petitioner did not timely raise any claim under the Constitution of the United States and because petitioner's constitutional claims are in any event insubstantial.

STATEMENT OF THE CASE

We refer the Court to the opinion of the New York State Court of Appeals for the facts of this case. As discussed further in the Reasons for Denying the Writ, petitioner has misstated the facts and law by contending:

(1) that the 1986 "toxic torts" legislation created a right of recovery not previously recognized under New York law in favor of a "class" of plaintiffs to which petitioner belongs (petition at 8-11);

(2) that respondents' motions to dismiss petitioner's claims were based on statute of limitations grounds (petition at 11);[3] and

(3) that either the Court of Appeals majority or the dissenting judge analyzed this case on the basis of whether petitioner should be included in a "class" of plaintiffs afforded a remedy by the Legislature (petition at 12-14).

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[3] As explained in the decision of the intermediate appellate court (petition at 4c), respondents (1) moved to dismiss the claims of Patricia Enright on the ground that the statute purporting to revive her time-barred claims was unconstitutional and (2) moved to dismiss the claims of petitioner Karen Enright on the ground that New York law does not recognize claims for "preconception tort." The Court of Appeals considered only the latter issue (petition at 7b).

REASONS FOR DENYING THE WRIT

POINT I

The federal questions which petitioner seeks to have reviewed by this Court were not timely raised in the State courts.

A. No constitutional issue was raised prior to petitioner's motion for reargument.

Petitioner seeks review of the Court of Appeals' decision on the ground that the decision creates an exception to the 1986 "toxic torts" legislation which discriminates against a particular class of DES plaintiffs in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The petition should be denied because no constitutional issues were raised in the trial court or the intermediate appellate court or on petitioner's appeal to the Court of Appeals.

Petitioner first attempted to raise constitutional issues in her motion for reargument of the Court of Appeals' decision. This attempt to raise such issues was untimely. The Rules of Practice of the New York State Court of Appeals limit reargument to "points claimed to have been overlooked or misapprehended by the court." 22 N.Y.C.R.R. §500.11(g)(1). The Rules further state: "The motion may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons." 22 N.Y.C.R.R. §500.11(g)(3).

Petitioner admitted in her motion for reargument that no constitutional issue had previously been presented to the Court of Appeals.[4] She stated in footnote 8 at page 8 of her motion:

> Although reargument is generally limited to issues "overlooked or misapprehended by the Court," NYCRR 500.11(g)(3) explicitly provides the right to raise points for the first time "for extraordinary and compelling reasons." Plaintiff respectfully submits that the need for judicial review of the equal protection and due process concerns (which were implicitly raised and discussed by both the majority and dissent, See Opinion at pg. 15, and See Dissent at pg. 12), establish "extraordinary and compelling reasons" thus justifying their being explicitly raised by plaintiff herein.

(Petition at 15e).

Contrary to petitioner's position, neither the majority nor the dissent raised or discussed any constitutional issues at the cited pages of the decision or otherwise.[5] The statement (petition at 2) that the Court of Appeals "implicitly rejected petitioner's federal constitutional claims" is an unsupported inference on petitioner's part. The fact that petitioner raised constitutional issues (among others) in her motion for reargument and the

[4] Even if petitioner had sought to raise constitutional issues on her appeal to the Court of Appeals, she would have been precluded from doing so by reason of her failure to raise such issues in the trial or intermediate appellate courts. *See* 11 Carmody-Wait 2d, *Cyclopedia of New York Practice* §71:114, at 126 (1966 ed. & supp. 1991) ("in accordance with the general rule as to questions not presented to or decided by the trial court or the Appellate Division, constitutional questions cannot be raised for the first time in the Court of Appeals").

[5] The pages cited in the above-quoted excerpt from petitioner's motion for reargument are set forth at pages 18b-19b and 33b-34b of the petition.

Court of Appeals denied the motion is an insufficient basis for review by this Court. The applicable rule is stated in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1958):

> Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.

(Citations omitted). *See* Stern & Gressman, *Supreme Court Practice* §3.21(c) at 155 (6th ed. 1986):

> To constitute a reviewable judgment under such circumstances, the order denying the petition must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. There must be language indicating that the federal question was considered and disposed of.

(Citations omitted).[6] There is no basis to assume that the Court of Appeals considered and disposed of any of the constitutional issues asserted by petitioner.

B. No constitutional issue was ever raised relating to the claimed unconstitutional exception to the "toxic torts" legislation.

The petition should be denied on the further ground that, even if petitioner raised *some* constitutional issues in her motion for reargument, the specific issues on which she seeks review by this Court were never

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[6] Petitioner cannot argue that the claimed constitutional issues were unanticipated and first arose when the Court of Appeals dismissed her claims. *See* Stern & Gressman, *supra*, §3.21(c), at 156. Petitioner's claims had been dismissed in the first instance by the trial court (petition at 1d), and petitioner raised no constitutional objections to that dismissal on her intermediate appeal.

previously raised. Petitioner contended in her motion for reargument that the Court of Appeals' decision was unconstitutional because it had "the effect of denying access to our Courts to all preconception tort victims, (treating them dissimilarly to all other tort victims)" based on "the nature of the injury, and . . . concerns particular to the pharmaceutical industry" (petition at 15e, n. 9). Petitioner now argues that the Court of Appeals' decision:

1. presents a "separation of powers" issue (petition at 16);

2. violated the equal protection clause by "subcategoriz[ing] . . . petitioner on generational grounds, so as to exclude her from the legislatively created class to which she ostensibly belongs" (petition at 17); and

3. "impermissibl[y] deprived petitioner of her property rights to an existing cause of action" (petition at 19).

Petitioner did not mention "separation of powers" in her motion for reargument, nor did she articulate a "due process" claim in the present terms. Petitioner's "equal protection" claim in her motion for reargument centered on the assertion that the Court of Appeals had denied her and other "preconception tort" claimants "equal access" to the courts. The claim that petitioner was unconstitutionally excluded from a "legislatively created class" was made for the first time in her petition to this Court[7] and should not be reviewed. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[7] Petitioner did state in her motion for reargument that "the legislature . . . strongly indicated that the policy of this state favors that access to our Courts be permitted to DES victims—and Karen Enright falls within that class" (petition at 17e), but this falls short of her present claim that she was specifically excluded from the scope of "a state statute which provides access to the courts to all those injured by either direct or indirect exposure to DES" (petition at 5).

POINT II

The Court of Appeals' decision addressed only issues of State law and does not raise the constitutional issues claimed by petitioner.

Notwithstanding petitioner's assertions, the Court of Appeals' decision does not address, or implicate, issues of constitutional law or the timeliness of petitioner's claims under the 1986 "toxic torts" legislation. Rather, the decision speaks to an issue exclusively reserved to the judicial power of the State: whether a claim for preconception tort liability is cognizable under New York common law. Petitioner's asserted constitutional issues are the product of a misguided and erroneous interpretation of the 1986 legislation and the Court of Appeals' decision.

A. Purpose and effect of the 1986 "toxic torts" legislation.

The pertinent sections of the 1986 "toxic torts" legislation (1) adopted a discovery-based statute of limitations applicable to claims for injuries "caused by the latent effect of exposure to any substance or combination of substances" and (2) revived for a period of one year time-barred claims for injuries "caused by the latent effects of exposure" to DES and certain other substances (petition at 3-5). The legislation thus altered "the longstanding rule in this State that the limitations period accrued upon exposure in actions alleging personal injury caused by toxic substances." *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 503, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989), *cert. denied*, 110 S. Ct. 350 (1990).

The legislation did not create a right to recover in favor of any "class"; it simply removed the statute of limitations barrier which had prevented certain plaintiffs

from asserting recognized causes of action. As stated in the legislative history:

> What we are doing here—and I think that it's important to emphasize this—is we are changing a statute of limitations here. We are changing a procedural measure. We are not changing substantive right.

Record of Proceedings, N.Y. Senate, June 23, 1986, pp. 5152-53 (Remarks of Sen. Connor). What has been said of the revival statute may be said of the 1986 legislation as a whole:

> It is a purely procedural device .... Although it reflects this State's policy favoring a remedy for DES-caused injuries, it does not create a substantive cause of action where none otherwise exists.

Anderson v. Eli Lilly & Co., 158 A.D.2d 91, 95, 557 N.Y.S.2d 981 (N.Y. App. Div., 3d Dep't 1990), *leave to appeal granted*, 77 N.Y.2d 803, 569 N.E.2d 1026, 568 N.Y.S.2d 347 (1991).

B. Basis of the Court of Appeals' decision.

Prior to its decision in this case, the Court of Appeals in *Albala v. City of New York*, 54 N.Y.2d 269, 273, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981) had refused to recognize a cause of action for "preconception tort" in negligence cases because of the "[u]nlimited hypotheses accompanied by staggering implications" suggested by such a cause of action. The *Albala* court described its task in that case as a matter of "defining the common law," and it based its decision on the need "to strike the delicate balance between the competing policy considerations which arise whenever tort liability is sought to be extended beyond traditional bounds." 54 N.Y.2d at 275.

The decision in the present case was simply an application of the common law as defined in *Albala* to the particular context of DES cases. Specifically, the court found that the alleged cause of petitioner's injuries—her mother's claimed *in utero* exposure to DES—did not "alter[ ] the policy balance we struck in *Albala*" (petiton at 11b).

C. Petitioner has mischaracterized the legislation and decision.

It is inaccurate if not misleading to state that the Court of Appeals in the present case "carv[ed] out a *class* of litigants who could not recover under the Toxic Torts legislation" (petition at 13) (emphasis in original). In the first place, as shown above, the 1986 legislation was a procedural measure which dealt with statute of limitations issues not involved in this case,[8] and it is clear that the legislation did not confer any right to recover on plaintiffs seeking to assert causes of action not previously recognized by the New York courts. Moreover, in reaching its decision, the Court of Appeals did not determine the parameters of any legislatively-created class: as noted above, it concluded only that the policy behind the 1986 legislation did not justify an exception to the *Albala* decision for DES cases. As petitioner was not excluded from the scope of any legislative benefit, the Court of Appeals' decision does not give rise to any of the constitutional issues claimed to be implicated by such exclusion.

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[8] Petitioner is an infant, and under New York law the statute of limitations is tolled with respect to the claim of an infant until she reaches age 18. N.Y. Civil Practice Law and Rules §208.

POINT III

The constitutional issues raised by petitioner are insubstantial.

Petitioner's constitutional claims are in any event insubstantial. Petitioner has not specified the federal constitutional provisions allegedly implicated by her "separation of powers" argument. Petitioner's "due process" claim is likewise insubstantial, as it is clear that the Court of Appeals' decision does not deprive petitioner of any existing right conferred by statute or otherwise. *Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) ("[A] state may not deprive a person of all existing remedies for the enforcement of a right . . . .").

With respect to equal protection, petitioner's real complaint is not that the Court of Appeals deprived her of a right of recovery conferred on some class of plaintiffs by the Legislature, but rather that the court applied State common law in a manner which precludes her and other "preconception tort" claimants from recovery. This objection does not raise any federal claim. "[I]t is for the state courts to interpret and declare the law of the state . . . ." *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra*, 281 U.S. at 681 n.8. The development of State law is constitutionally constrained only by the principle

> that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141 (1940). *** In applying the Equal Protection Clause to most forms

> of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Plyler v. Doe, 457 U.S. 202, 216 (1982).

The Court of Appeals' decision plainly meets this standard. As both *Albala* and this case show, there are obvious factual differences between traditional tort cases and "preconception tort" cases. As a result, different policy considerations are implicated and differing treatment of the two types of cases is justified, even within the DES context. The particular resolution of the "preconception tort" issue arrived at by the New York State Court of Appeals does not raise any issues reviewable by this Court.

CONCLUSION

The petition should be denied for the reasons stated above.

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Respectfully submitted,

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